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INJUNCTIONS TO RESTRAIN SUITS IN A FOREIGN JURISDICTION. — The jurisdiction of a sovereign to enjoin persons within his dominions from taking part in judicial proceedings abroad follows from his power to give commands to all persons within his realm. It would, indeed, be undesirable to give commands obedience to which he could not insure, such as an order to do affirmative acts abroad. But in the case of negative decrees there would seem to be no such objection. This jurisdiction to render decrees has been delegated by sovereigns in common-law countries to courts of equity in cases where such a decree is necessary to protect the equitable rights of others. Therefore where the foreign suit can fairly be regarded as an infringement upon such a right the jurisdiction of equity to enjoin it is scarcely disputable.[1]

Nevertheless, the question of when a person has an equitable right to be sued in one state rather than another is often one of considerable difficulty, since it involves a consideration of the respect due to foreign tribunals and the necessity of refraining from interference with proceedings before them except for good cause.[2] Thus it is generally recognized

[1] Portarlington *v.* Soulby, 3 Myl. & K. 104; Dehon *v.* Foster, 4 Allen (Mass.) 545; Vermont & C. R. Co. *v.* Vermont Central R. Co., 46 Vt. 792. *Contra*, Lowe *v.* Baker, Freem. 125. Realizing that the presence of a person within the state gives the state jurisdiction over him, some courts are inclined to pay scant heed to the question whether the objections to suit abroad are strong enough to entitle the plaintiff to an injunction on ordinary equitable principles. *Cf.* Snook *v.* Snetzer, 25 Oh. St. 516; 5 ILL. L. REV. 1.

[2] Such interference is not, however, a violation of the "due faith and credit" or the "privileges and immunities" clauses of the federal Constitution. U. S. CONST. Art. 4, §§ 1, 2; Cole *v.* Cunningham, 133 U. S. 107, 10 Sup. Ct. 269.

that a suit in a foreign court ought not to be enjoined on any theory that the court of the forum has a better understanding of the principles of justice than its neighbor.[3] Nor would the fact that the suit involves a knowledge of the local law as to which the domestic court has superior information seem a sufficient ground for an injunction.[4] So, too, the fact that the foreign procedure is more favorable to the party suing there than that of the forum is generally immaterial.[5] If, however, the domestic procedure is not merely a method of conducting trials, but involves a local policy such as the protection of a certain class in the community, it is generally held inequitable for one citizen of that community to seek to deprive another of the advantages of this law by suing him abroad.[6] On this ground the evasion of exemption laws by foreign attachment on the part of a domestic creditor is generally enjoined.[7] So too, where a court is attempting to distribute the assets of a bankrupt ratably by receivership or insolvency proceedings, a domestic creditor will be restrained from securing a preference by a foreign suit.[8]

In cases where a suit at law within the jurisdiction would be enjoined, the same reasons will generally justify enjoining an action in a foreign state.[9] Thus a vexatious multiplicity of suits in the same jurisdiction will be enjoined.[10] And the same principle applies to simultaneous suits in separate jurisdictions.[11] Nevertheless it is now held in England that such suits are *primâ facie* not vexatious, since the plaintiff is entitled to any procedural advantage which he may thus obtain.[12] It would

[3] Carson *v.* Dunham, 149 Mass. 52, 20 N. E. 312; Bigelow *v.* Old Dominion Copper, etc. Co., 74 N. J. Eq. 457, 71 Atl. 153. Even though, as between the parties, a plaintiff is entitled to equitable relief, the court, on grounds of public policy, may refuse to grant an injunction. Therefore, although the court believes that the defendant will not obtain justice from the foreign tribunal, the necessity for harmony between courts and the principles of comity should make it very slow to grant an injunction, especially since the other court may retort with an injunction and thus make any settlement of the litigation impossible. See Peck *v.* Jenness, 7 How. (U. S.) 612, 625.

[4] Hyman *v.* Helm, 24 Ch. D. 531; Royal League *v.* Kavanagh, 233 Ill. 175, 84 N. E. 178. But *cf.* Bushby *v.* Munday, 5 Madd. 297. It is sometimes said that suit abroad is an evasion of the local law. Dinsmore *v.* Neresheimer, 32 Hun (N. Y.) 204. Where the issue is one of substantive law this charge is unfounded, since any court will presumably apply the law which created the right and not that of the forum.

[5] Thorndike *v.* Thorndike, 142 Ill. 450, 32 N. E. 510; Edgell *v.* Clarke, 19 N. Y. App. Div. 199, 45 N. Y. Supp. 979.

[6] See Bigelow *v.* Old Dominion Copper, etc. Co., 74 N. J. Eq. 457, 481, 71 Atl. 153, 163. So a citizen of Maryland was enjoined from suing another citizen in New York and arresting him for debt which was opposed to Maryland policy. Miller *v.* Gittings, 85 Md. 601, 37 Atl. 372. The wisdom and justice of the attempt to make the local policy binding on the citizens of a state both at home and abroad in such a case as this may be questioned. See 5 ILL. L. REV. 1, 15.

[7] Snook *v.* Snetzer, *supra*; Wilson *v.* Joseph, 107 Ind. 490, 8 N. E. 616. Since the validity of foreign attachments of choses in action is scarcely defensible on principle, a state would seem justified in adopting every legal means of interfering with them. *Cf.* Renier *v.* Hurlbut, 81 Wis. 24, 50 N. W. 783. But *cf.* Chicago, R. I. & P. Ry. *v.* Sturm, 174 U. S. 710, 19 Sup. Ct. 797.

[8] Dehon *v.* Foster, *supra*; Sercomb *v.* Catlin, 128 Ill. 556, 21 N. E. 606.

[9] Portarlington *v.* Soulby, *supra*. See Carron Iron Co. *v.* Maclaren, 5 H. L. Cas. *416, *439.

[10] Sheffield Waterworks *v.* Yeomans, L. R. 2 Ch. 8; Third Ave. R. Co. *v.* Mayor, etc. of New York, 54 N. Y. 159.

[11] See Wedderburn *v.* Wedderburn, 4 Myl. & C. 585, 596; Carron Iron Co. *v.* Maclaren, 5 H. L. Cas. *416, *437.

[12] McHenry *v.* Lewis, 22 Ch. D. 397; Hyman *v.* Helm, 24 Ch. D. 531.

seem, however, that no injustice would be done by compelling him to elect between the two suits, since this would enable him to try his case in the most advantageous forum, and, if successful there, to levy on the property in the other state by suing on his judgment.[13] Such a rule would spare the defendant much needless expense. The American authorities hold, however, that the question involves not merely the rights of the parties but the right of the court which first gets jurisdiction of a question to retain it. On this ground the second suit is generally enjoined by the court in which the action is first brought.[14] A recent case would seem to be correct on either theory in dissolving a preliminary injunction against a second suit abroad after the domestic suit had been discontinued, since the prior jurisdiction of the local court had thus come to an end, and no serious harassing of the other party was involved.[15] *Jones* v. *Hughes*, 137 N. W. 1023 (Ia.).

THE RELATION OF ESTOPPEL TO AFFIRMATIVE DUTIES IN THE LAW OF TORTS. — That there is no affirmative duty to act has long been one of the axioms of the law of torts. An act may have been attended with many legal consequences, but none were attached to a mere failure to act. Omission was an act in legal fiction only when some duty had been voluntarily assumed.[1] There is a tendency in the law, however, to impose a liability in certain cases for a mere failure to act although arising from no relation thus assumed. The owner of land may be estopped to assert his title [2] or to sue for a trespass [3] if he fails to warn a stranger who is innocently dealing with the land as the property of another. A cor-

[13] White *v.* Caxton Book-binding Co., 10 Civ. Proc. (N. Y.) 146. *Contra*, Peruvian Guano Co. *v.* Bockwoldt, 23 Ch. D. 225.

[14] Fisk *v.* Union Pacific R. Co., 10 Blatchf. (U. S.) 518; French, Trustee, *v.* Hay, 22 Wall. (U. S.) 250; Home Ins. Co. *v.* Howell, 24 N. J. Eq. 238. This rule that the court which first gets possession of the controversy shall retain it is well calculated to prevent coördinate courts from interfering with each other. Although it is perhaps a question of the relation between the courts, rather than between the parties, a court is probably justified in saying that no one over whom it has jurisdiction shall take part in abrogating this rule.

[15] In the principal case the foreign action was brought in an adjoining state. Even where the action is instituted at a place much more distant from the defendant's domicile, this fact alone is not generally regarded as a sufficient ground for an injunction. Fletcher *v.* Rodgers, 27 Wkly. R. 97; Edgell *v.* Clarke, *supra*.

[1] See Eckert *v.* Long Island Ry. Co., 43 N. Y. 502, 505, 508; 1 BEVEN, NEGLIGENCE, 3 ed., 157, note 4; HOLMES, COMMON LAW, 82, 152, 161; 8 HARV. L. REV. 386.

[2] Coram *v.* Palmer, 58 So. 721 (Fla.); Baillarge *v.* Clark, 145 Cal. 589, 79 Pac. 268. See 18 HARV. L. REV. 622. It is submitted that silence, unconnected with previous conduct, can never be a real representation. It seems doubtful if mere presence within hearing of a sale is such previous conduct as to amount to a representation that the sale is valid. Certainly mere absence from a sale coupled with knowledge of the transaction is not a representation, that the sale is valid, to a purchaser who does not know of the real owner's existence, yet here too the courts raise an estoppel. Anderson *v.* Hubble, 93 Ind. 570. If the law chooses to treat such silence as a representation it is making omission an act, — *i. e.*, the law under certain circumstances imposes a duty to speak.

[3] Marvin *v.* Tusch, 98 N. E. 860 (Oh.); Adair *v.* Curry, 106 Mo. App. 578, 80 S. W. 967. *Contra*, Lewis *v.* Patton, 42 Mont. 528, 113 Pac. 745.